Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ALFRED S. HAYWARD, Personal Representative of the Estate of Delbert Lewis Hayward, Deceased,

Petitioner,

v.

VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a Valley Vista Care Center; SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY INCORPORATED; JACK BOTTS; CHAD BROWN and NANCY RENFREW, JERROLD E. PARK, and RICHARD K. THURSTON, M.D., Co-Personal Representatives of the ESTATE OF W. DYCE THURSTON, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a nursing home patient's right of action in contract is protected under Medicare and Medicaid provisions requiring nursing homes to guarantee patients freedom from chemical restraint, the right to choose health care providers, and the right to exercise federal constitutional rights.

2. Whether claims arising out of the involuntary confinement of a patient in a nursing home, in violation of Medicare and Medicaid requirements, sound in contract, as opposed to medical negligence.

PARTIES TO PROCEEDINGS

All of the parties to the proceedings in the Idaho Supreme Court appear in the caption of this case.

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Supreme Court Rule 10 6

I. OPINIONS AND ORDERS BELOW

The opinion of the Idaho Supreme Court in this case is published at *Hayward v. Valley Vista Care Corp., et al.*, 33 P.3d 816 (Idaho 2001), as corrected December 28, 2001. This opinion is reproduced in full at App. 1 – App. 29 to this Petition.

II. JURISDICTION

The opinion of the Idaho Supreme Court, announced on September 28, 2001, was entered as the final judgment in this case on October 19, 2001, pursuant to Idaho Rule on Appeal 38(b) (App. 32). This Court has jurisdiction under 28 U.S.C. § 1257.

III. CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The texts of the following provisions are reproduced in the Appendix to this Petition:

U.S. Const. Art. VI, clause 2 (App. 32)
42 U.S.C. § 1395i-3(c) (App. 33 – App. 38)
42 U.S.C. § 1395i-3(h)(5) (App. 38 – App. 39)
42 U.S.C. § 1396r(c) (App. 39 – App. 44)
42 U.S.C. § 1396r(h)(8) (App. 44)
42 C.F.R. § 483.10 (App. 44 – App. 59)
42 C.F.R. § 483.12 (App. 59 – App. 65)

IV. STATEMENT OF THE CASE

This case presents an issue never before addressed by this Court, and which potentially affects millions of

vulnerable individuals residing in nursing homes. Factually, it involves what the Idaho District Court recognized as "egregious facts," (Verbatim Report of Proceedings, hearing of 8/20/1999, at 52), involving the secret and systematic drug poisoning of an 85-year-old man, Delbert Hayward, in order to keep him virtually imprisoned in a nursing home against his will and his chosen doctor's wishes, incur escalating medical costs, and ultimately increase corporate profits at the expense of a human life. After 11 months of confinement, Mr. Hayward died from what evidence at trial will show were complications arising from drug overdoses. In proceedings in Idaho state court, the plaintiff, Alfred S. Hayward, heir and personal representative of the estate of Delbert L. Hayward (Hayward), was ultimately allowed to amend his complaint to state a wrongful death claim under Idaho law, against Valley Vista Care Corporation (VVCC); Jack's Pharmacy, Inc., Jack Botts, Chad Brown and Nancy Renfrew (collectively referred to as Jack's); and the estate of Dr. W. Dyce Thurston (Thurston). *See* App. 21. However, his breach of contract claim, which involves contractual promises secured under 42 U.S.C. § 1395i-3 (Medicare) and 42 U.S.C. § 1396r (Medicaid), was dismissed on summary judgment. *Id.* Hayward requests that this Court grant his petition for certiorari to address the viability of his contract claim, as protected by specific Medicaid and Medicare provisions.

Background Facts Regarding Breach of Contract Claim.

The basic facts are set forth in the Idaho Supreme Court Opinion at App. 2 – App. 5. The following additional facts, relevant to Hayward's breach of contract claim, were also before the Idaho Supreme Court: Upon Delbert Hayward's admission to VVCC, the nursing home staff social services director signed an admission agreement on behalf of Delbert Hayward, who refused to sign it himself. (R. Vol. III, at 385, L. 2-21 and exhibits #39-43, 59, 63, 91; R. Vol. II, p. 1190). This agreement required the use of Jack's Pharmacy as the supplying pharmacy for all drugs used by Delbert Hayward during his confinement. (R. Vol. VII, at 1179-89). More importantly, it specifically stated, among numerous other terms, that Delbert had a right to exercise his constitutional rights, to be free of chemical restraint, and to select his personal physician. (R. Vol. VII, at 1179-89). These terms of VVCC's contract with Delbert Hayward were reinforced by a separate written agreement between VVCC, the State of Idaho for Medicaid and, through incorporation, the United States for payment by Medicare. Specifically, VVCC was required to uphold Delbert's basic individual rights and to comply with all pertinent regulations, as a condition of reimbursement under Medicaid and Medicare, pursuant to 42 U.S.C. § 1395i-3(c)(1) – (3) (assuring patient rights; no chemical restraint; choice of physician), 42 U.S.C. § 1396r(c)(1)(A) (requiring compliance with federal and state regulation and professional standards) (R. Vol. VII, at 1179-89; R. Vol IX exhibit #86 at 3, 6). VVCC received money from both the State of Idaho and the United States for the care of Delbert Hayward

under the representation that it had complied with these requirements. (R. Vol. IX exhibits #106, #75).

Proceedings Below.

On February 14, 1997, Hayward timely filed two separate actions. One, a wrongful death action, was filed on behalf of Delbert Hayward's heirs in United States District Court for the District of Idaho. (R. Vol. I, at 45). The present action, filed in Benewah County District Court in Idaho, alleged breach of contract, and was brought on behalf of the estate of Delbert Hayward to recover medical expenses. (R. Vol. I, at 1-11). Both the federal and state complaints alleged the same transactions and occurrences, and named the same defendants. (R. Vol. I, at 1-11, 44-45); *see* App. 3.

Hayward's state complaint alleged that the defendants breached duties imposed upon them by the terms of Delbert Hayward's admission agreement with VVCC, as well as duties imposed under federal and state law. *See* App. 3. This complaint identified that defendant's obligations arose in part under federal law. (R. Vol. I, at 1-11). Specifically, Paragraph IV of the complaint stated: "Defendant Valley Vista Care Center promised in their contract . . . to comply with applicable Federal and State laws." (R. Vol. I, at 3). Paragraph XV (e) stated: "Delbert Lewis Hayward was imprisoned because of the excessive medical restraints which were used before trying the least restrictive means of control which were against Valley Vista Care Center's own rules and regulations as well as Federal and State laws." (R. Vol. I, at 7). Paragraph XVII stated: "Defendants were under a continuing duty, under

Federal and State law, and by the terms of said admission agreement to exercise reasonable care in its treatment of Delbert Lewis Hayward in light of his known condition." (R. Vol. I, at 8). The complaint further alleged that, as a direct and proximate result of the defendants' breach of their contractual obligations, Hayward incurred medical expenses and costs. (R. Vol. I, at 9).

The action in federal district court was ultimately dismissed for lack of diversity jurisdiction. (R. Vol. VII, at 1352-54). Hayward then sought to amend his Idaho state complaint to state a claim for wrongful death in addition to breach of contract. (R. Vol. IV, at 687-89). The Idaho district court denied Hayward's motion to amend, and dismissed all causes of action. (R. Vol. VI, at 1110-35; R. Vol. VI, at 1596-1605). In regard to Hayward's contract-based claim, the district court concluded this claim was, in effect, one for professional medical negligence or malpractice under Idaho Code § 6-1012, which did not survive Delbert Hayward's death. (R. Vol. VI, at 1597, 1604) (Relevant portions of I.C. § 6-1012 are set forth at App. 17 – App. 18).

Hayward appealed, and the appeal was heard directly by the Idaho Supreme Court. The Idaho Supreme Court reversed that portion of the district court's ruling that denied Hayward's motion to amend the complaint to formally add the wrongful death claim. App. 7 – App. 17. It affirmed dismissal of the contract claim, however, on the ground that this claim pertains to "the provision of or failure to provide health care." App. 17 – App. 20. Though acknowledging Hayward's reliance on federal requirements as imposing contractual obligations upon

the defendants, App. 3, the Idaho Supreme Court determined Hayward's contract-based claims pertained solely to the provision of or failure to provide health care, and thus sounded in medical negligence under Idaho law. App. 20. In so holding, the Court failed to address Hayward's specific claims for defendants' breach of their obligations under 42 U.S.C. §§ 1395i-3 & 1396r, regarding a nursing home resident's right to be free from chemical restraint, to choose a physician, and to otherwise exercise his federal constitutional rights.

V. ARGUMENT

Review on a writ of certiorari is appropriate in this case to determine the enforceability in an action for breach of contract of the specific rights of nursing home patients under 42 U.S.C. §§ 1395i-3 & 1396r. This is an important question of federal law that has not been, but should be, decided by this Court. *See generally* Supreme Court Rule 10 (considerations governing review on certiorari).

The condition of nursing home patients is an issue of ongoing concern. In 1983, the Health Care Financing Administration of the U.S. Department of Health and Human Services commissioned the Institute of Medicine to conduct a study of nursing home care and to recommend ways to improve federal nursing home regulation. This study found nursing home care in this country "grossly inadequate" and "appallingly bad," marked by "abuse of residents." Institute of Medicine, *Improving the Quality of Care in Nursing Homes* 3 (1986), H.R. Rep. No. 100-391(I), at 452 (1987), *reprinted in* 1987 U.S.C.C.A.N.

2313-268, 2313-272. In 1987, as a response to this study, the Omnibus Budget Reform Act of 1987 (OBRA 1987) significantly changed the regulatory environment of nursing homes by enacting a group of amendments to the Medicare and Medicaid statutes, known collectively as the Nursing Home Reform Law. This legislation and its implementing regulations have tried to improve, though without significant success, the conditions in nursing homes. *See* 42 U.S.C. § 1395i-3 (Medicare); 42 U.S.C. § 1396r (Medicaid); 42 C.F.R. 483.10 & 483.12.

Included in the Nursing Home Reform Law are specific requirements for contracts with nursing home patients upon admission and thereafter. For example, nursing homes are required to include contractual terms stating that the patient has the right to be free from chemical restraint, to choose his or her own physician, and to exercise federal constitutional rights. 42 U.S.C. § 1395i-3(c)(1)(A); 42 U.S.C. § 1396r(c)(1)(A); *see* App. 33 – App. 36; App. 39 – App. 42. None of these provisions expressly provide a private cause of action. *See Brogdon ex rel. Cline v. National Healthcare Corp.*, 103 F.Supp.2d 1322, 1330 (N.D.Ga. 2000). At the same time, however, it is generally recognized that the Medicare and Medicaid statutes were enacted for the benefit of recipients such as nursing home patients. *See Silver v. Baggiano*, 804 F.2d 1211, 1217 (11th Cir. 1986).

The question before the Court in this petition is a novel one. This Court has never addressed the interplay between these specific requirements for contracts with nursing home patients and the patients' private right of action in contract under state law. In *O'Bannon v. Town*

Court Nursing Ctr., 447 U.S. 773 (1980), the Court recognized the possibility that nursing home patients might have contract-based claims against nursing homes under state law in certain circumstances, *id.* at 788 & n.20, but expressed no opinion on the availability of such remedies in that case. *Id.* at 790. Nor has the Court indicated what form such an action might take, though it seems clear this action is conceptually distinct from the recognized action for claims "arising under" the Medicare Act, which must be brought exclusively under federal law. *See Heckler v. Ringer*, 466 U.S. 602, 614-15 (1984). Similarly, it is not the same as a direct implied private right of action under the Medicare or Medicaid Acts themselves, which the majority of courts have held does not exist. *See Wheat v. Mass.*, 994 F.2d 273, 276 (5th Cir. 1993); *accord Brogdon*, 103 F.Supp.2d at 1330-31 (collecting cases) & 1334 (distinguishing contract-based claims from implied cause of action).

Rather, a nursing home patient's right of action in contract, based on a provider's breach of the promises required under the Medicare and Medicaid Acts, should be viewed as among the panoply of common law remedies that these Acts do not preclude. Both 42 U.S.C. § 1395i-3(h)(5) and 42 U.S.C. § 1396r(h)(8), state:

> The remedies provided under this subsection are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law.

App. 38 (42 U.S.C. § 1395i-3(h)(5)); App. 44 (42 U.S.C. § 1396r(h)(8)). Contract-based rights are generally

defined by state, rather than federal law. *Cf. Miree v. DeKalb County*, 433 U.S. 25 (1977) (holding state law governed whether contract action existed, based on a theory of third-party beneficiary to contract between the Federal Aviation Administration and airport). Relying in part on this Court's holding in *Miree*, at least one lower court has recognized a nursing home patient's right of action for breach of promises contained in a contract between a nursing home facility and the State, pursuant to the requirements of the Medicare and Medicaid Acts. *See Brogdon*, 103 F.Supp.2d at 1333-34. While that case involved only a third-party beneficiary theory, this case also involves a first-party breach of the contract between Delbert Hayward and the defendants, which incorporates the requirements of the federal-state contracts.

In failing to recognize Hayward's right of action for breach of contract, the Idaho Supreme Court ignored the contractual terms predicated on the defendants' compliance with the Medicare and Medicaid Acts. *See* App. 17 – App. 20. The Court characterized Hayward's claims as essentially alleging medical malpractice, *viz.*, the provision of or failure to provide health care. The relevant provisions of 42 U.S.C. §§ 1395i-3 & 1396r preclude such characterization. The contractual promises required under these provisions concern *basic individual rights* – freedom from chemical restraint, the right to select one's own physician, and other fundamental guarantees of privacy, safety and freedom from abuse. *See* 42 U.S.C. § 1395i-3(c)(1)(A); 42 U.S.C. § 1396r(c)(1)(A). A nursing home facility accepting funds under Medicare and Medicaid must provide, upon admission and thereafter, written notice to the patient of his or her rights under these

provisions. *See* 42 C.F.R. §§ 483.10 & 483.12. The contract between Delbert Hayward and VVCC included provisions consistent with these federal statutory requirements. (R. Vol. VII, at 1179-89). To conclude, as did the Idaho Supreme Court, that claims for breach of these contractual provisions are swept up in tort claims for inadequate medical care, is to trivialize the federally-mandated goal of assuring nursing home residents their basic dignity. *See* 42 C.F.R. § 483.10 (stating, "[t]he resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility.")

Moreover, the Idaho Supreme Court's failure to recognize the enforceability of the federal requirements, via a right of action in contract, is contrary to the recognized supremacy of federal law under the Medicaid and Medicare Acts. *See generally*, U.S. Const., Art. VI, cl. 2. The comprehensive nature of the Medicare and Medicaid scheme has led some lower courts to conclude that it is so pervasive as to preempt local regulation. *See, e.g., Newman v. Kelly*, 848 F.Supp. 228 (D.D.C. 1994). Even those courts that find preemption less encompassing, and Congress's authority to place conditions on states participating in Medicaid and Medicare limited, recognize that the Act's express requirements must be followed. *See Brogdon*, 103 F.Supp.2d at 1339 (concluding "the authority to require compliance with participation standards is derived not from the primacy of federal law . . . but from the terms of a contract and the agreement to abide by those terms in return for the receipt of federal moneys.") The effect of the Idaho Supreme Court's opinion is to allow nursing home facilities to avoid the terms of their

contracts, by removing the mechanism by which they are enforced.

The issue presented in this petition is a matter of federal, not state, law. While the Idaho Supreme Court relied upon Idaho Code § 6-1012 in characterizing Hayward's contract-based claims as claims for medical negligence, this provision is not actually involved in this case. As discussed previously, the Medicare and Medicaid provisions at issue do not involve the provision or failure to provide health care. This Court remains at liberty to properly construe these statutes regardless of the Idaho Supreme Court's disposition of this case. Nor should the fact that the Idaho Supreme Court failed to address the impact of federal law on its reasoning prevent this Court from reaching the issue. The issue was briefed and argued in that Court. When an issue of importance has not been, but should be, addressed by this Court, it does not hesitate to grant review, even where a state court opinion has erroneously overlooked the issue.

VI. CONCLUSION

The rights assured to nursing home patients in 42 U.S.C. §§ 1395i-3 & 1396r form the basis of contractual promises, separate and distinct from claims for medical negligence. Enforcement of these promises is essential to protecting vulnerable individuals from over-reaching and abuse, and the interplay between these promises and a common law action for breach of contract, should be addressed by this Court. Accordingly, Hayward respectfully requests that this Court grant his petition for certiorari.

Dated this 17th day of January, 2002.

Respectfully submitted,

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APPENDIX

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E. 42 U.S.C. § 1395i–3(c) .....App. 33

F. 42 U.S.C. § 1395i–3(h)(5) .....App. 38

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I. 42 C.F.R. § 483.10 .....App. 44

J. 42 C.F.R. § 483.12 .....App. 59

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 26008

ALFRED S. HAYWARD, Personal Representative of the Estate of Delbert Lewis Hayward, deceased,

Plaintiff-Appellant,

v.

VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a Valley Vista Care Center, SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY, INCORPORATED; JACK BOTTS; CHAD BROWN; NANCY RENFREW; JERROLD E. PARK and RICHARD K. THURSTON, M.D., Co-Personal Representatives of the Estate of W. Dyce Thurston, M.D.,

Defendants-Respondents.

Coeur d'Alene, April 2001 Term

2001 Opinion No. 85

Filed: September 28, 2001

Frederick C. Lyon, Clerk

Appeal from the District Court of the First Judicial District of the State of Idaho, Benewah County. Hon. Craig C. Kosonen, District Judge.

The decision of the district court is *reversed* and *remanded*.

Cody Law Office, Coeur d'Alene; Eymann, Allison, Hunter & Jones, LLC, Spokane; for appellant. Debra L. Stephens argued.

Christensen & Doman, St. Maries, for respondent Valley Vista. Andrew P. Doman argued.

Paine, Hamblen, Coffin, Brooke & Miller, Coeur d'Alene, for respondent Jack's Pharmacy, Inc. Eugene L. Miller argued.

Paine, Hamblen, Coffin, Brooke & Miller, Coeur d'Alene, for respondents Park and Thurston. Troy Y. Nelson argued.

KIDWELL, Justice

Alfred S. Hayward (Alfred), personal representative of his father's estate, appeals the lower court's ruling denying Alfred's motion to amend his state court complaint to add a wrongful death claim and the lower court's ruling granting summary judgment dismissal of Alfred's remaining state court claims.

I.

FACTS AND PROCEDURAL HISTORY

Delbert Hayward (Delbert), an eighty-five-year-old resident of northern Idaho, lived at his home in Emida, Idaho, with the assistance of home health care providers. In order to continue the home health care services, the Idaho Department of Health and Welfare required Delbert to submit to periodic medical evaluations.

Delbert was admitted into Kootenai Medical Center on February 22, 1994, in order for the required evaluation to be conducted. On March 4, 1994, Delbert was released to a personal care home in Hayden Lake, Idaho. He was admitted back into Kootenai Medical Center on March 10, 1994, when he refused to eat and wanted to return to his home. After being discharged from Kootenai Medical

Center for the second time, Delbert was admitted to Valley Vista Care Center (Valley Vista), a nursing home facility in St. Maries, Idaho. He resided at Valley Vista from March 11, 1994, until his death on February 16, 1995.

On February 14, 1997, Alfred S. Hayward, a surviving son of the decedent and a resident of Oregon, filed two complaints. One, a wrongful death action, was filed in federal district court. The other, a complaint consisting primarily of contractual allegations, was filed in state court. The state court complaint was brought on behalf of the estate of Delbert Hayward and sought to recover medical expenses. Both complaints contained identical factual allegations. The defendants named in both complaints were Valley Vista and various health care professionals that provided services to Valley Vista.

In Alfred's complaint, he claimed that his father was falsely imprisoned in the nursing home and that the negligent care he received there, including the injection of high dosages of the drug Haldol, attributed to his father's death. Alfred also alleged that the defendants breached duties imposed on them by the terms of Alfred's admission agreement, as well as duties imposed under federal and state law. Alfred's wrongful death claim filed in federal district court asserted diversity of citizenship, based on the fact that Alfred was a resident of Oregon, his brother and sister were residents of Washington, and the defendants were all residents of Idaho.

On March 10, 1997, the defendants moved to dismiss the federal court action based on lack of diversity jurisdiction and because there were "identical wrongful death

claims in both courts." The defendants argued that diversity could not be maintained since a personal representative is deemed to be a resident of the decedent's state of residency. In this case, since Delbert was a resident of Idaho, Alfred's state of residency was also Idaho. Consequently, the diversity requirements were no longer satisfied.

On February 6, 1998, the federal court granted a motion filed by Alfred to amend the complaint (to change the plaintiff's status from personal representative to heir) and denied the defendants' motion to dismiss. On June 8, 1998, Alfred moved the federal court to exercise supplemental jurisdiction over the state court claim for breach of contract. The federal court declined to do so on November 18, 1998.

The defendants moved the court to reconsider it's denial of the motion to dismiss for lack of subject matter jurisdiction. On February 24, 1999, the federal court dismissed the federal claim in its entirety, finding that the court lacked subject matter jurisdiction over the complaint when it was originally filed and that it had erred in its previous decision. The court found that Alfred was not entitled to change his status from personal representative to heir in order to create diversity.

On March 10, 1999, Alfred moved the court to amend the state court complaint to add the claim of "loss of love and affection of their father," which, in effect, served to add a claim for wrongful death.

On April 7 and 8, 1999, defendants Thurston and Valley Vista moved the trial court for summary judgment

dismissal of the breach of contract claims, as well as for the dismissal of the entire case. These motions were granted by the trial court judge on June 18, 1999.

The district court found that the plaintiff was not allowed to amend the state court complaint to add the wrongful death action. In making this determination, the district court focused on two key factors. First, the district court noted that the statute of limitations had run for the wrongful death action. Second, the court highlighted the fact that the plaintiff had brought the claim as personal representative, not as heir. According to the district court, even if the statute of limitations could have been avoided through the "relation-back" doctrine, the fact that the complaint was brought by the personal representative, instead of the heir, precluded the amendment. The court noted, "[R]elating back to '97 won't do you any good because you didn't have the right party pleading. And amending a complaint by adding a party will not get you the relation back doctrine under Rule 15 anyway." The court also found that the original complaint did not state a cause of action for wrongful death and that any cause of action stated did not survive the death of the decedent. Summary judgment was subsequently granted in favor of Jack's Pharmacy. The district court subsequently denied Alfred's motion for reconsideration of the summary judgment. Alfred filed this timely appeal.

II.

STANDARD OF REVIEW

A court's decision to allow the amendment of pleadings is reviewed for an abuse of discretion. When determining whether a trial court has abused its discretion, this Court asks: "(1) whether the court correctly perceived the issue as one of discretion; (2) whether it acted within the outer boundaries of that discretion and consistently with any applicable legal standards; and (3) whether it reached its decision by an exercise of reason." *Hough v. Fry*, 131 Idaho 230, 232, 953 P.2d 980, 982 (1998) (internal citations omitted).

In *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 993 P.2d 1197 (1999), this Court set forth the following standard of review to be utilized when a summary judgment is being reviewed:

> When this Court reviews a district court's grant of summary judgment, it uses the same standard properly employed by the district court originally ruling on the motion. Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The record is construed in the light most favorable to the non-moving party, and all reasonable inferences are drawn in favor of that party. If reasonable minds might come to different conclusions, summary judgment is

> inappropriate. On appeal, this Court exercises free review.

Id. at 870, 993 P.2d at 1201 (internal citations omitted).

III.

ANALYSIS

A. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING ALFRED LEAVE TO AMEND THE COMPLAINT TO FORMALLY ALLEGE A WRONGFUL DEATH CLAIM.

Rule 15(a) of the Idaho Rules of Civil Procedure

Idaho Rule of Civil Procedure 15(a) reads in relevant part, "[A] party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . . " I.R.C.P. 15(a).

A detailed examination of this rule was recently set forth by the Court in *Carl H. Christensen Family Trust:*

> The twin purposes behind the rule are to allow claims to be determined on the merits rather than on technicalities, and to make pleadings serve the limited role of providing notice of the nature of the claim and the facts at issue.
>
> It is within the district court's sound discretion to decide whether to allow a party to amend its complaint after a responsive pleading has been served. "[I]n the interest of justice, district courts should favor liberal grants of leave to amend a complaint."

Id. at 871, 993 P.2d at 1202 (internal citations omitted).

The Court went on to discuss the effect of "timeliness" on a motion to amend, noting that in *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977), this Court adopted the reasoning of the U.S. Supreme Court in interpreting the comparable federal rule:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be freely given.

Id. at 871, 993 P.2d at 1202.

Other factors this Court considers when reviewing a trial court's decision to grant a motion to amend include: 1) if the amended pleading provides a valid claim; 2) if the opposing party would be prejudiced by the delay in adding the new claim; and 3) if the opposing party has an available defense such as the statute of limitations. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991). If the opposing party has such a defense, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint. *Id.*

We begin the analysis by noting that various actions taken by the respondents demonstrate that the defense was aware of the wrongful death action and would suffer no prejudice as a result of the amended complaint. For example, the language utilized in a motion to stay filed by Jack's Pharmacy stated, "The plaintiff has filed duplicate and parallel litigation claims in the United States

District Court for the District of Idaho, Northern Division . . . making claims for the asserted and alleged wrongful death of Delbert Lewis Hayward. The Plaintiff, in above-entitled matter, basically makes the same allegations, including the claim for relief for wrongful death."

Additionally, at one point in the proceedings, respondent Valley Vista filed a response to Alfred's motion requesting the federal court to exercise supplemental jurisdiction. In this response, Valley Vista noted, "Although the Plaintiff characterizes the estate claim as one for breach of contract, a review of that claim reveals that it is much broader; his complaint asserts actions for negligence, false imprisonment, intentional misconduct, medical malpractice, and arguably for the wrongful death of the decedent." This same response stated, "Given that the factual allegations contained in the Plaintiff's estate claim, and this claim, are virtually identical, abstention is appropriate to provide the state court with an opportunity to address common issues of law and fact to be determined in each proceeding."

This argument is also supported by a reply brief filed by Valley Vista. In that brief, the respondent noted, "[A] review of the Plaintiff's estate claim reveals that he raises causes of action for negligence, malpractice, false imprisonment, contract and wrongful death."

Finally, it is relevant to observe that one of the federal district court orders in this case noted, "[D]efendants argue that Plaintiff has an identical action in state court, so dismissal of this action would not be prejudicial."

Due to the respondents' awareness of the wrongful death claim, the district court erred in refusing to grant

Alfred leave to amend the complaint. Allowing the amendment would comply with the "liberal application" policy set forth by this Court and would not result in prejudice, undue hardship, or surprise to the respondents. With this in mind, we acknowledge that Alfred's claim will not survive if it is barred by the statute of limitations, as held by the district court. Therefore, an examination of the relation-back doctrine of I.R.C.P. 15(c) is necessary.

The relation-back doctrine of I.R.C.P. 15(c)

Under I.C. § 5-219, the statute of limitations in a wrongful death action is two years following the date of the decedent's death; in this case, Delbert died on February 16, 1995. Alfred brought a wrongful death action in federal court and a contract claim in state court on February 14, 1997, two days before the expiration of the statute of limitations. None of the parties dispute the fact that the statute of limitations had expired by the time Alfred moved the court to amend the state court complaint to add the wrongful death action. Consequently, unless the relation-back doctrine under Rule 15(c) applies, the wrongful death action is time-barred.

Under Rule 15(c):

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . . The relation back of an

> amendment joining or substituting a real party in interest shall be as provided in Rule 17(a).

I.R.C.P. 15(c).

The district court found that a wrongful death claim had not been stated in the state court complaint. The district court observed that the complaint did not contain any language indicating that it was brought on behalf of the heirs and that "it made no mention of or claim to those damages which are traditionally, exclusively the entitlement of the surviving heirs of a decedent whose death was occasioned wrongfully." The court noted, "Where the original complaint does not give notice of the legal theory in an amended complaint, the amendment is a new cause of action which does not relate back."

In this case, the original complaint filed in state court contained the following allegations:

> XVII.
>
> Following Defendants acceptance of Delbert Lewis Hayward as a patient, Defendants were under a continuing duty, under Federal and State law, and by the terms of said admission agreement to exercise reasonable care in its treatment of Delbert Lewis Hayward in light of his known condition. Defendants negligently and willfully failed to properly monitor and assess Delbert Lewis Hayward, which was a proximate cause of his death.
>
> XVIII.
>
> During March of 1994, Defendant negligently, willfully, and recklessly failed to properly monitor the behavior changes of Delbert Lewis Hayward due to extreme increases in his

> psychotropic medication which resulted in the development of the usual and natural side effects of Haldol; tardive dyskensia, and resulting swallowing paralysis which caused his aspiration and death.
>
> XIX.
>
> As a direct and proximate result of Defendant's negligence and tortious conduct to Delbert Lewis Hayward, he suffered serious physical injuries, and ultimately died.

We find that the original complaint gave notice of the legal theory based on a wrongful death action. The allegations in both the original complaint and the amended complaint were based on the same factual allegations arising out of the same conduct, transaction or occurrence. This holding complies with previous cases decided by this Court addressing an alleged "new cause of action" raised in an amended complaint. *Wing v. Martin*, 107 Idaho 267, 270, 688 P.2d 1172, 1175 (1984) (affirming the district court's refusal to allow the amendment to relate back to the date of the original filing because "Plaintiffs' amended complaints alleged wrongful conduct . . . arising at a different time and with regard to a different set of facts."); *Suitts v. First Security Bank of Idaho*, 110 Idaho 15, 23, 713 P.2d 1374, 1382 (1985) (finding that the district court erred in denying the motion to amend because both the new legal theory based on tort and the previous theory based on contract were based on the same underlying conduct, transaction, or occurrence).

Additionally, in this case, the wrongful death action was pursued in federal court, thus giving further notice to respondents that this legal theory was being pursued.

Because a new cause of action was not stated, the amended complaint qualified for the application of the relation-back doctrine found in I.R.C.P. 15(c).

Next, we must address whether the combined application of I.R.C.P. 15(c) and 17(a) is appropriate given the unique set of facts presented in this case. Specifically, we must determine whether the fact that Alfred mistakenly named the incorrect party in the complaint precludes the application of the relation-back doctrine.

The Combined Effect of Rule 15(c) and Rule 17(a)

I.R.C.P. 17(a) provides in relevant part:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, personal representative . . . may sue in this capacity without joining the party for whose benefit the action is brought. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

I.R.C.P. 17(a).

This rule is intended to "prevent forfeiture when determination of the proper party is difficult or when an understandable mistake has been made in selecting the party plaintiff." *Conda Partnership, Inc. v. M.D. Constr. Co., Inc.*, 115 Idaho 902, 904, 771 P.2d 920, 922 (Ct. App. 1989).

Liberal construction should be given to this rule and courts should "further the policy favoring the just resolution of actions – providing litigants their day in court." *Id.* (citing *Holmes v. Henderson Oil Co.*, 102 Idaho 214, 628 P.2d 1048 (1981)).

In this case, Alfred brought the state court claim as "Alfred S. Hayward, Personal Representative of the Estate of Delbert Lewis Hayward, Deceased." The district court found that Alfred was not a real party in interest, since he did not bring the claim as an "heir" or as a "personal representative on behalf of the heirs." According to the district court, even if Alfred were allowed to add the wrongful death claim to the state court claim, he would have to add a party or change the party listed on the pleading.

Although not binding on this Court, the Court of Appeals set forth various considerations regarding Rule 17(a) substitutions or joinders in *Conda Partnership, Inc.*, 115 Idaho at 904, 771 P.2d at 922. In that case, the Court of Appeals found that the good faith of the plaintiff and prejudice experienced by the defendant are factors to consider. *Id.* It also observed that, "Rule 17(a) is not intended to validate claims filed without any real basis but with the hope that a proper party will eventually materialize in order to benefit from suspended statutes of limitation." *Id.* "However, this principle has no application to cases in which substitution of the real party in interest is necessary to avoid injustice." *Id.*

Various federal courts have also provided informative insight on the combined application of Rule 15(c) and Rule 17(a) of the Federal Rules of Civil Procedure. For

example, in *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967), the circuit court reviewed a district court's dismissal of a wrongful death claim based on a finding that the statute of limitations had run. *Id.* at 414. The wrongful death claim had originally been filed by the decedent's wife who was named in the complaint as "administratrix of the estate of the decedent, as plaintiff." *Id.* Under the applicable state law, the administratrix was not an appropriate party to bring a wrongful death action. *Id.* at 415. Consequently, the plaintiff moved to amend the complaint in order to bring the action on behalf of the heirs of the decedent. *Id.* at 414. On appeal, the eighth circuit found that the district court erred in dismissing the complaint, as rules 15(c) and 17(a) covered the relation-back issue presented to the court. *Id.* at 418. In reaching its decision, the court looked to the policy behind the federal rules such as eliminating "procedural booby traps" and permitting that "bona fide complaints be carried to an adjudication on the merits." *Id.*

Likewise, in *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11 (2nd Cir. 1997), the circuit court explored a district court's denial of a motion to amend to change the named plaintiffs. *Id.* at 14. The district court's denial was in part based on a finding that the decision to use the plaintiffs named in the original complaint was a "tactical" decision, as opposed to a "mistake." *Id.* The circuit court reversed the decision of the district court, finding that the language and policy behind Rule 15(c) and Rule 17(a) mandated a contrary conclusion. *Id.* at 20-21. The court noted, "A Rule 17(a) substitution of plaintiffs should be liberally allowed when the change is

merely formal and in no way alters the original complaint's factual allegations as to the events or participants." *Id.* at 20.

Finally, we note that courts from other jurisdictions have applied a more lenient standard to the relation back of a motion to amend that primarily centers around the capacity in which the plaintiff brings the action. *See, e.g., Beal v. City of Seattle,* 954 P.2d 237, 244 (Wash. 1998) (finding that CR 17(a) and CR 15(c), Washington's equivalent to the federal rules, did not bar amendment and relation back in a wrongful death case because the change was only in the representative capacity in which the suit was brought and the defendant was not prejudiced); *Flores v. Cameron County,* 92 F.3d 258, 273 (5th Cir. 1996) (finding that plaintiff should be allowed to amend her complaint to state her representative capacity as temporary administrator of the estate because the amendment "[sought] to correct a technical difficulty."); *Frankel v. Styer,* 209 F.Supp. 509, 510 (E.D. Pa. 1962) (allowing plaintiff to amend complaint to bring suit as administrator, instead of as guardian and trustee ad litem, because "the substitution is merely a change of fiduciaries of the persons in whose behalf the action was brought.").

In this case, by substituting the real party in interest, Alfred would merely be changing the representative capacity in which the suit is being brought. Consequently, as the aforementioned cases demonstrate, Alfred should be allowed to substitute the real party in interest and relate the amendment back to the date of the original complaint. Allowing such a substitution would promote the liberal policy behind the rules, as it would allow the case to proceed on the merits, thus preventing it from

being dismissed on a technicality. Further support of this conclusion can be found in the lack of evidence in the record indicating bad faith on the part of Alfred and the fact that the respondents will not be prejudiced by such a result.

In accordance with the applicable standard of review in this case, this Court must determine if the trial court correctly applied the appropriate legal standards through an "exercise of reason." We disagree with the trial court's interpretation and application of Idaho Rules of Civil Procedure 15(a), (c), and 17(a) for the reasons set forth. Consequently, we hold that the district court's denial of Alfred's motion to amend the complaint was an abuse of discretion and the decision of the district court is reversed and remanded.

B. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON HAYWARD'S CONTRACT-BASED CLAIMS.

Idaho Code § 6-1012 provides in relevant part:

> *In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including,* without limitation, *any* dentist, . . . hospital or *nursing home,* or any person vicariously liable for the negligence of them or any of them, on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by

> direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she, or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. . . .

I.C. § 6-1012 (emphasis added).

In an Idaho Supreme Court case dating back to 1932, this Court explored whether a plaintiff could bring both a contract claim and a malpractice claim against a health care professional whose negligence resulted in injury. *Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932). In that case, the Court noted:

> [T]he basic allegations of the complaint are directed solely to carelessness, negligence and misconduct as the proximate cause of the injury claimed to have been suffered. Respondent is not arraigned for breach of contract but for delinquencies incidental to its performance. As alleged, these are the very foundation of the

> action, and if true, constituted nothing but malpractice. The gist of a malpractice action is negligence, not a breach of the contract of employment.

Id. at 415-16, 16 P.2d at 662.

In a more recent Idaho case, this Court examined a claim brought by a patient who was injured when she fell off a balance board utilized by her physical therapist to promote ankle strengthening. *Hough,* 131 Idaho at 232, 953 P.2d at 982. The appellant, Hough, originally pursued a malpractice claim against the therapist. *Id.* Later, she moved to amend her complaint to allege ordinary negligence. *Id.* The appellant argued that I.C. § 6-1012 does not apply in cases of "ordinary negligence" where "the act complained of requires no specialized skill or knowledge." *Id.* at 233, 953 P.2d at 983.

The Court ultimately rejected Hough's argument, noting that physical therapy is a type of medical care specifically covered by I.C. § 6-1012. *Id.* Further, the Court found, "Thus, to determine if I.C. § 6-1012 applies, courts need only look to see if the injury occurred on account of the provision of or failure to provide health care." *Id.* The Court explained, "The language of the statute clearly treats the provision of health care as a single act and not a series of steps, each of which must be analyzed to determine if it involved professional judgment." *Id.*

In the case currently before the Court, the district court found that I.C. § 6-1012 precluded Alfred from bringing a claim based on a breach of contract theory. The district court noted that the claims were for malpractice, regardless of the label assigned to them.

We agree. The basis of Alfred's remaining state court claims pertain to "the provision of or failure to provide health care." Consequently, I.C. § 6-1012 and the language set forth in *Hough*, preclude Alfred from bringing a contract claim against the nursing home. The district court's grant of summary judgment on Alfred's remaining state court claims is affirmed.

C. NONE OF THE PARTIES ARE ENTITLED TO ATTORNEY FEES ON APPEAL.

Alfred, as the prevailing party, is the only party who potentially may be entitled to attorney fees. Alfred cites to the fee provision found in I.C. § 12-120(3), the code provision pertaining to the recovery of fees "in any civil action to recover on [a] . . . contract relating to the purchase or sale of goods . . . or services."

Actions alleging malpractice are tort actions and "even though the underlying transaction which resulted in the malpractice was a 'commercial transaction,' attorney fees under 12-120(3) are not authorized." *Fuller v. Wolters*, 119 Idaho 415, 425, 807 P.2d 633, 643 (1991). We hold that since Alfred's "contract" claims are really malpractice actions, attorney fees should not be granted.

Alfred does not cite to any other statutory provision that would enable him to recover attorney fees. Consequently, attorney fees are not awarded.

IV.

CONCLUSION

The district court erred in denying Alfred's motion to amend the state court complaint to add the wrongful death claim because I.R.C.P. 15(c) and 17(a) provide Alfred with a manner in which to substitute a real party in interest and then relate the amendment back to the date of the original complaint. Consequently, the district court's decision to deny the motion to amend is reversed and remanded for action consistent with this opinion.

Summary judgment dismissal of Alfred's contractual claims is affirmed, as the malpractice provisions of the code preclude the alleged contract claims. None of the parties are entitled to attorney fees.

Costs are awarded to appellant.

Chief Justice TROUT, Justices SCHROEDER and WALTERS, **CONCUR**.

Justice EISMANN, **SPECIALLY CONCURRING**

I concur in Parts I., II., III. B and C, and I concur in the result in Parts III. A and IV.

On February 16, 1995, Delbert Hayward (Delbert) died. For tactical reasons, the personal representative of his estate filed two lawsuits regarding his treatment and death. The personal representative, who was Delbert's son Alfred, filed a wrongful death action in federal court

and a survival action in state court.[1] In the federal lawsuit, the personal representative sought to recover "[f]or Plaintiff's loss of love and companionship of his father, Delbert Lewis Hayward." In the state lawsuit, the personal representative sought to recover "[f]or Plaintiff's medical expenses and costs associated with his hospitalization, treatment, and death to exceed Ten Thousand Dollars ($10,000)."[2] The federal lawsuit was dismissed for

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[1] The state court lawsuit alleged false imprisonment of Hayward in the nursing home, negligence in treating him, and breach of a contractual agreement to exercise reasonable care in treating him. Because the basis of all claims was the provision of or failure to provide health care, the action was one for medical malpractice. IDAHO CODE § 6-1012 (1998).

[2] A survival action is for the damages the deceased suffered and could have sued for had he survived, while a wrongful death action involves the damages suffered by the heirs of the decedent because of his death, such as loss of guidance, support, etc. *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980). They are two entirely separate causes of action. *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944). At common law a tort action for personal injuries abated upon the death either of the injured person or of the tortfeasor. *Stucki v. Loveland*, 94 Idaho 621, 495 P.2d 571 (1972). If the tortfeasor died, his personal representative was not liable in his official capacity for personal injuries caused by the decedent during his lifetime. *Id.* Likewise, if the victim of the tort died before recovering a judgment, his cause of action also died. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990). If a person's death was caused by the wrongful act of another, the relatives and dependents of the decedent did not have any cause of action at common law. *Id.* When actions for wrongful death were authorized in Idaho by the enactment of Idaho Code § 5-311, this Court held that the common law rule, preventing recovery from the personal representative of the deceased tortfeasor, remained in force. *Id.* In response, the legislature enacted a survival statute that

lack of diversity jurisdiction, and the personal representative then moved to amend the state lawsuit to add a claim for wrongful death. The proposed second amended complaint would have added in the prayer a request to recover "[f]or Plaintiff's loss of love and companionship of his father, Delbert Lewis Hayward."

The defendants' motions for summary judgment were heard and granted before the district court ruled on the plaintiff's motion to filed [sic] a second amended complaint adding a claim for wrongful death. The plaintiff filed a motion for reconsideration seeking clarification as to whether the district court intended to dismiss the plaintiff's wrongful death claim and seeking permission to file the second amended complaint.[3] The district court denied the motion for reconsideration upon the ground that a claim for wrongful death would be barred by the statute of limitations because it would not relate back

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permitted tort actions, except actions for slander or libel, to survive the death of the wrongdoer. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990); IDAHO CODE § 5-327 (1998). Under Idaho law, however, an action for personal injuries does not survive the death of the victim of the tort. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990).

[3] The district court granted the motions for summary judgment and entered an order stating, "That all of the Plaintiff's claims in Plaintiff's Second Amended Complaint are hereby dismissed as to Defendants, Valley Vista Care Corporation, Scott F. Burpee, Jan Burpee and Nancy Renfrew (Valley Vista) and the Estate of W. Dyce Thurston." Although it dismissed the claims in "Plaintiff's Second Amended Complaint," the district court had never entered an order granting the plaintiff permission to file the second amended complaint.

under Idaho Rule of Civil Procedure 15(c). In so holding, the district court stated in its decision, "Where the original complaint does not give notice of the legal theory in an amended complaint, the amendment is a new cause of action which does not relate back. *Wing v. Martin,* 120 [sic] Idaho 267, 688 P.2d 1172 (1984)."

The majority finds that "the original complaint gave notice of the legal theory based on a wrongful death action." I cannot agree with the majority because the original complaint in the state lawsuit was carefully drafted so that it alleged a survival cause of action, not a wrongful death cause of action. Counsel for the personal representative conceded during oral argument that the complaint in the state lawsuit was intended to allege a survival action, not a wrongful death action.[4] Although defendants' counsel argued in federal court that the state lawsuit was a wrongful death action, the nature of the

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[4] Excerpts of the argument are as follows:

> JUSTICE EISMANN: Well, if you look at the pleadings, though, there are differences between the two complaints, and it's clear that those differences are because the federal action was intended to be a wrongful death action and the state action was intended to be an action for torts that occurred prior to death. Is that correct?
>
> DEBRA L. STEPHENS: Yes, your Honor.
>
> . . . .
>
> JUSTICE EISMANN: But one was a wrongful death action and the other was to assert claims that arose before death.
>
> DEBRA L. STEPHENS: True, your Honor.
>
> . . . .

cause of action alleged in the complaint should be based upon the wording of the complaint, not upon the arguments made by defense counsel in a related case. The district court was correct in stating that the original complaint in the state lawsuit did not give notice of a cause of action for wrongful death.

Although I cannot agree that the original complaint in the state lawsuit gave notice of a wrongful death action, I agree that the district court erred in holding that a claim for wrongful death would not relate back to the date of the original complaint. The district court held that a claim for wrongful death would not relate back because it was a new cause of action. Relation back under Rule 15(c) of the Idaho Rules of Civil Procedure does not depend upon whether a new cause of action is being asserted. *Suitts v. First Security Bank of Idaho, N.A.*, 110 Idaho 15, 713 P.2d 1374 (1985). That rule states, "Whenever the claim . . . asserted in the amended pleading arose

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JUSTICE EISMANN: I know now you want to say the state court action was a wrongful death action, but it's clear that that's not the way it was filed.

DEBRA L. STEPHENS: True, and we're not disputing that. Again, our argument is that –

JUSTICE EISMANN: So if you take it based upon the pleadings, it was not a wrongful death action.

DEBRA L. STEPHENS: Depends on how you read the pleadings. Did we intend a wrongful death action? No.

. . . .

JUSTICE KIDWELL: Well, I'm a little bit concerned because you said that you did not, you acknowledged that you did not intend to file a wrongful death action.

DEBRA L. STEPHENS: Right.

out of the conduct, transaction, or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading." Here, the claim for wrongful death arose out of the conduct or occurrence set forth in the original complaint in the state lawsuit. The factual allegations in the original complaint in the state lawsuit were identical to the factual allegations in the proposed second amended complaint. The original complaint included the allegation, "As a direct and proximate result of Defendants' negligence and tortuous conduct to Delbert Lewis Hayward, he suffered serious physical injuries, and ultimately died." The only material change that would be made by the proposed amended complaint would be to add in the prayer a request to recover "[f]or Plaintiff's loss of love and companionship of his father, Delbert Lewis Hayward." Thus, under Rule 15(c) the proposed amended complaint seeking to add a cause of action for wrongful death would relate back to the date of the original complaint because the claim for wrongful death "arose out of the conduct . . . or occurrence set forth . . . in the original pleading."

Our decision in *Wing v. Martin,* 120 [sic] Idaho 267, 688 P.2d 1172 (1984), is not to the contrary. In *Wing,* the amended complaints did not relate back because they "alleged wrongful conduct by DuPont arising at a different time and with regard to a different set of facts than those involved in the original complaint." *Id.* at 270, 688 P.2d at 1175.

The majority next addresses the combined application of Rules 15(c) and 17(a) of the Idaho Rules of Civil Procedure. The majority states that "Alfred mistakenly

named the incorrect party in the complaint" and concludes that he "should be allowed to substitute the real party in interest and relate the amendment back to the date of the original complaint." The facts in this case do not raise any issue regarding substitution of the real party in interest, nor did the plaintiff ever request permission to do so.

The plaintiff, as identified in the caption of the original complaint in the state court lawsuit, is "Alfred S. Hayward, Personal Representative of the Estate of Delbert Lewis Hayward, Deceased." The proposed second amended complaint would not have changed the named plaintiff, nor is there any need to do so. The personal representative can bring an action for wrongful death,[5] and need not join the heirs as parties. "[A]

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[5] Idaho Code § 5-311(1) provides:

> When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just.

A decedent's "heirs or personal representatives on their behalf" may maintain an action to recover damages for wrongful death.

The statute is ambiguous as to whether the phrase "personal representatives" means the personal representatives

personal representative . . . may sue in this capacity without joining the party for whose benefit the action is brought." IDAHO R. CIV. P. 17(a). As personal representative, Alfred could bring an action to recover any claims the estate may have, and he could bring a wrongful death action to recover for Delbert's death. There is no need to expressly allege that an action brought by the personal representative is prosecuted "on behalf of the estate" or "on behalf of the heirs." Alfred's capacity is that of personal representative, and in that capacity he could bring either a survival action (if Idaho recognized such action) or a wrongful death action.

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of the decedent or the personal representatives of the heirs. The statute could be read to have "personal representatives" refer to the personal representatives of the heirs. That argument would be based upon the fact that a decedent usually has only one personal representative. Thus, the reference to "personal representatives" (plural) must refer to the personal representatives of more than one person, and "heirs" is the only plural noun to which the phrase could refer. Later in the statute, however, the phrase "personal representatives" clearly refers to the personal representatives (plural) of a single decedent. The statute states, "If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives." If "personal representatives" were read to mean the personal representatives of the "heirs" of the decedent, it would transform Idaho Code § 5-311 into a form of survival action. That reading would provide that an heir's claim for wrongful death would survive the heir's death and could be brought by the heir's personal representative. There is nothing indicating that Idaho Code § 5-311 was intended by the legislature to be in part a survival statute. Therefore, the phrase "personal representatives" should be read as referring to the personal representatives of the decedent.

Where, as here, the plaintiff in the original complaint could have brought the claim sought to be added by the amendment, and where the claim sought to be added "arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading," the amendment would relate back to the date of the original pleading. Therefore, the district court erred in denying the proposed amendment on the ground that the claim to be added would be barred by the statute of limitations.

In the Supreme Court of the State of Idaho

ALFRED S. HAYWARD, Personal Representative of the Estate of Delbert Lewis Hayward, deceased, Plaintiff-Appellant, v. VALLEY VISTA CARE CORPORATION, a non-profit corporation, d/b/a Valley Vista Care Center, SCOTT F. BURPEE and JAN BURPEE; JACK'S PHARMACY, INCORPORATED JACK BOTTS; CHAD BROWN; NANCY RENFREW, JERROLD E. PARK and RICHARD K. THURSTON, M.D., Co-Personal representatives of the Estate of W. Dyce Thurston, M.D., Defendants-Respondents.	)	REMITTITUR NO. 26008

TO: FIRST JUDICIAL DISTRICT, COUNTY OF BENEWAH.

The Court having announced its Opinion in this cause September 28, 2001, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the opinion, if any action is required; and

IT IS FURTHER ORDERED that costs in the amount of $2,105.05 are allowed to Appellant.

DATED this 22nd day of October 2001.

/s/ _____
Clerk of the Supreme Court
STATE OF IDAHO

U.S. Const. ARTICLE VI. – MISCELLANEOUS PROVISIONS

Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Idaho Rule on Appeal 38. Opinions and remittiturs.

(a) Opinions. The filing of an opinion of the Court shall be the announcement of the opinion. A certified copy of the opinion filed in an appeal or proceeding shall be mailed forthwith by the Clerk of the Supreme Court to the clerk of the district court or administrative agency from which the appeal was taken and copies of the opinion shall be mailed to each party in the appeal or proceeding and to the presiding district judge or chairman of the administrative agency.

(b) Finality of Opinions. Opinions shall become final 21 days after the date of the last of the following events:

(1) The announcement of the opinion;

(2) The announcement of the opinion on rehearing;

(3) The announcement of a modified opinion without a rehearing.

(c) Remittiturs. When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the district court or administrative agency appealed from and mail copies to all parties to the appeal and to the presiding district judge or chairman of the agency. The remittitur shall advise the district court or administrative agency that the opinion has become final and that the district court or administrative agency shall forthwith comply with the directive of the opinion.

(d) Costs and Attorney Fees. The taxation of costs and attorney fees, if any, shall be included in the remittitur if the same have been determined, but the issuance of the remittitur shall not be delayed if the taxation of such items has not been determined.

(Adopted March 25, 1977, effective July 1, 1977.)

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42 U.S.C. Sec. 1395i-3. – Requirements for, and assuring quality of care in, skilled nursing facilities

(c) Requirements relating to residents' rights

(1) General rights

(A) Specified rights

A skilled nursing facility must protect and promote the rights of each resident, including each of the following rights:

(i) Free choice

The right to choose a personal attending physician, to be fully informed in advance about care and treatment, to be fully informed in advance of any changes in care or treatment that may affect the resident's well-being, and (except with respect to a resident adjudged incompetent) to participate in planning care and treatment or changes in care and treatment.

(ii) Free from restraints

The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms. Restraints may only be imposed –

(I)

to ensure the physical safety of the resident or other residents, and

(II)

only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances specified by the Secretary until such an order could reasonably be obtained).

(iii) Privacy

The right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups.

(iv) Confidentiality

The right to confidentiality of personal and clinical records and to access to current clinical records of the resident upon request by the resident or the resident's legal representative, within 24 hours (excluding hours occurring during a weekend or holiday) after making such a request.

(v) Accommodation of needs

The right –

(I)

to reside and receive services with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered, and

(II)

to receive notice before the room or roommate of the resident in the facility is changed.

(vi) Grievances

The right to voice grievances with respect to treatment or care that is (or fails to be) furnished, without discrimination or reprisal for voicing the grievances and the right to prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents.

(vii) Participation in resident and family groups

The right of the resident to organize and participate in resident groups in the facility and the right of the resident's family to meet in the facility with the families of other residents in the facility.

(viii) Participation in other activities

The right of the resident to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility.

(ix) Examination of survey results

The right to examine, upon reasonable request, the results of the most recent survey of the facility conducted by the Secretary or a State with respect to the facility and any plan of correction in effect with respect to the facility.

(x) Refusal of certain transfers

The right to refuse a transfer to another room within the facility, if a purpose of the transfer is to relocate the resident from a portion of the facility that is a skilled nursing facility (for purposes of this subchapter) to a portion of the facility that is not such a skilled nursing facility.

(xi) Other rights

Any other right established by the Secretary.

Clause (iii) shall not be construed as requiring the provision of a private room. A resident's exercise of a right to refuse transfer under clause (x) shall not affect the resident's eligibility or entitlement to benefits under this

subchapter or to medical assistance under subchapter XIX of this chapter.

(B) Notice of rights and services

A skilled nursing facility must –

(i)

inform each resident, orally and in writing at the time of admission to the facility, of the resident's legal rights during the stay at the facility;

(ii)

make available to each resident, upon reasonable request, a written statement of such rights (which statement is updated upon changes in such rights) including the notice (if any) of the State developed under section 1396r(e)(6) of this title; and

(iii)

inform each other resident, in writing before or at the time of admission and periodically during the resident's stay, of services available in the facility and of related charges for such services, including any charges for services not covered under this subchapter or by the facility's basic per diem charge.

The written description of legal rights under this subparagraph shall include a description of the protection of personal funds under paragraph (6) and a statement that a resident may file a complaint with a State survey and certification agency respecting resident abuse and neglect and misappropriation of resident property in the facility.

(C) Rights of incompetent residents

In the case of a resident adjudged incompetent under the laws of a State, the rights of the resident under this subchapter shall devolve upon, and, to the extent judged necessary by a court of competent jurisdiction, be exercised by, the person appointed under State law to act on the resident's behalf.

(D) Use of psychopharmacologic drugs

Psychopharmacologic drugs may be administered only on the orders of a physician and only as part of a plan (included in the written plan of care described in paragraph (2)) designed to eliminate or modify the symptoms for which the drugs are prescribed and only if, at least annually, an independent, external consultant reviews the appropriateness of the drug plan of each resident receiving such drugs. In determining whether such a consultant is qualified to conduct reviews under the preceding sentence, the Secretary shall take into account the needs of nursing facilities under this subchapter to have access to the services of such a consultant on a timely basis.

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42 U.S.C. Sec. 1395i-3. – Requirements for, and assuring quality of care in, skilled nursing facilities

(h) (5) Construction

The remedies provided under this subsection are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other

remedies, including any remedy available to an individual at common law. The remedies described in clauses (i),[1] and (iii) of paragraph (2)(B) may be imposed during the pendency of any hearing.

[1] So in original. The comma probably should not appear.

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42 U.S.C. Sec. 1396r. – Requirements for nursing facilities

(c) Requirements relating to residents' rights

(1) General rights

(A) Specified rights

A nursing facility must protect and promote the rights of each resident, including each of the following rights:

(i) Free choice

The right to choose a personal attending physician, to be fully informed in advance about care and treatment, to be fully informed in advance of any changes in care or treatment that may affect the resident's well-being, and (except with respect to a resident adjudged incompetent) to participate in planning care and treatment or changes in care and treatment.

(ii) Free from restraints

The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline

or convenience and not required to treat the resident's medical symptoms. Restraints may only be imposed –

(I)

to ensure the physical safety of the resident or other residents, and

(II)

only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances specified by the Secretary until such an order could reasonably be obtained).

(iii) Privacy

The right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups.

(iv) Confidentiality

The right to confidentiality of personal and clinical records and to access to current clinical records of the resident upon request by the resident or the resident's legal representative, within 24 hours (excluding hours occurring during a weekend or holiday) after making such a request.

(v) Accommodation of needs

The right –

(I)

to reside and receive services with reasonable accommodation of individual needs and preferences, except

where the health or safety of the individual or other residents would be endangered, and

(II)

to receive notice before the room or roommate of the resident in the facility is changed.

(vi) Grievances

The right to voice grievances with respect to treatment or care that is (or fails to be) furnished, without discrimination or reprisal for voicing the grievances and the right to prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents.

(vii) Participation in resident and family groups

The right of the resident to organize and participate in resident groups in the facility and the right of the resident's family to meet in the facility with the families of other residents in the facility.

(viii) Participation in other activities

The right of the resident to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility.

(ix) Examination of survey results

The right to examine, upon reasonable request, the results of the most recent survey of the facility conducted by the Secretary or a State with respect to the facility and any plan of correction in effect with respect to the facility.

(x) Refusal of certain transfers

The right to refuse a transfer to another room within the facility, if a purpose of the transfer is to relocate the resident from a portion of the facility that is not a skilled nursing facility (for purposes of subchapter XVIII of this chapter) to a portion of the facility that is such a skilled nursing facility.

(xi) Other rights

Any other right established by the Secretary.

Clause (iii) shall not be construed as requiring the provision of a private room. A resident's exercise of a right to refuse transfer under clause (x) shall not affect the resident's eligibility or entitlement to medical assistance under this subchapter or a State's entitlement to Federal medical assistance under this subchapter with respect to services furnished to such a resident.

(B) Notice of rights

A nursing facility must –

(i)

inform each resident, orally and in writing at the time of admission to the facility, of the resident's legal rights during the stay at the facility and of the requirements and procedures for establishing eligibility for medical assistance under this subchapter, including the right to request an assessment under section 1396r-5(c)(1)(B) of this title;

(ii)

make available to each resident, upon reasonable request, a written statement of such rights (which statement is updated upon changes in such rights) including the notice (if any) of the State developed under subsection (e)(6) of this section;

(iii)

inform each resident who is entitled to medical assistance under this subchapter –

(I)

at the time of admission to the facility or, if later, at the time the resident becomes eligible for such assistance, of the items and services (including those specified under section 1396a(a)(28)(B) of this title) that are included in nursing facility services under the State plan and for which the resident may not be charged (except as permitted in section 1396o of this title), and of those other items and services that the facility offers and for which the resident may be charged and the amount of the charges for such items and services, and

(II)

of changes in the items and services described in subclause (I) and of changes in the charges imposed for items and services described in that subclause; and

(iv)

inform each other resident, in writing before or at the time of admission and periodically during the resident's stay, of services available in the facility and of related

charges for such services, including any charges for services not covered under subchapter XVIII of this chapter or by the facility's basic per diem charge.

The written description of legal rights under this subparagraph shall include a description of the protection of personal funds under paragraph (6) and a statement that a resident may file a complaint with a State survey and certification agency respecting resident abuse and neglect and misappropriation of resident property in the facility.

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42 U.S.C. Sec. 1396r. – Requirements for nursing facilities

(h) (8) Construction

The remedies provided under this subsection are in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law.

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42 C.F.R. Sec. 483.10 Resident rights.

The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident, including each of the following rights:

(a) Exercise of rights. (1) The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States.

(2) The resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights.

(3) In the case of a resident adjudged incompetent under the laws of a State by a court of competent jurisdiction, the rights of the resident are exercised by the person appointed under State law to act on the resident's behalf.

(4) In the case of a resident who has not been adjudged incompetent by the State court, any legal-surrogate designated in accordance with State law may exercise the resident's rights to the extent provided by State law.

(b) Notice of rights and services. (1) The facility must inform the resident both orally and in writing in a language that the resident understands of his or her rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility. The facility must also provide the resident with the notice (if any) of the State developed under section 1919(e)(6) of the Act. Such notification must be made prior to or upon admission and during the resident's stay. Receipt of such information, and any amendments to it, must be acknowledged in writing;

(2) The resident or his or her legal representative has the right –

(i) Upon an oral or written request, to access all records pertaining to himself or herself including current

clinical records within 24 hours (excluding weekends and holidays); and

(ii) After receipt of his or her records for inspection, to purchase at a cost not to exceed the community standard photocopies of the records or any portions of them upon request and 2 working days advance notice to the facility.

(3) The resident has the right to be fully informed in language that he or she can understand of his or her total health status, including but not limited to, his or her medical condition;

(4) The resident has the right to refuse treatment, to refuse to participate in experimental research, and to formulate an advance directive as specified in paragraph (8) of this section; and

(5) The facility must –

(i) Inform each resident who is entitled to Medicaid benefits, in writing, at the time of admission to the nursing facility or, when the resident becomes eligible for Medicaid of –

(A) The items and services that are included in nursing facility services under the State plan and for which the resident may not be charged;

(B) Those other items and services that the facility offers and for which the resident may be charged, and the amount of charges for those services; and

(ii) Inform each resident when changes are made to the items and services specified in paragraphs (5)(i)(A) and (B) of this section.

(6) The facility must inform each resident before, or at the time of admission, and periodically during the resident's stay, of services available in the facility and of charges for those services, including any charges for services not covered under Medicare or by the facility's per diem rate.

(7) The facility must furnish a written description of legal rights which includes –

(i) A description of the manner of protecting personal funds, under paragraph (c) of this section;

(ii) A description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment under section 1924(c) which determines the extent of a couple's non-exempt resources at the time of institutionalization and attributes to the community spouse an equitable share of resources which cannot be considered available for payment toward the cost of the institutionalized spouse's medical care in his or her process of spending down to Medicaid eligibility levels;

(iii) A posting of names, addresses, and telephone numbers of all pertinent State client advocacy groups such as the State survey and certification agency, the State licensure office, the State ombudsman program, the protection and advocacy network, and the Medicaid fraud control unit; and

(iv) A statement that the resident may file a complaint with the State survey and certification agency concerning resident abuse, neglect, misappropriation of

resident property in the facility, and non-compliance with the advance directives requirements.

(8) The facility must comply with the requirements specified in subpart I of part 489 of this chapter relating to maintaining written policies and procedures regarding advance directives. These requirements include provisions to inform and provide written information to all adult residents concerning the right to accept or refuse medical or surgical treatment and, at the individual's option, formulate an advance directive. This includes a written description of the facility's policies to implement advance directives and applicable State law. Facilities are permitted to contract with other entities to furnish this information but are still legally responsible for ensuring that the requirements of this section are met. If an adult individual is incapacitated at the time of admission and is unable to receive information (due to the incapacitating condition or a mental disorder) or articulate whether or not he or she has executed an advance directive, the facility may give advance directive information to the individual's family or surrogate in the same manner that it issues other materials about policies and procedures to the family of the incapacitated individual or to a surrogate or other concerned persons in accordance with State law. The facility is not relieved of its obligation to provide this information to the individual once he or she is no longer incapacitated or unable to receive such information. Follow-up procedures must be in place to provide the information to the individual directly at the appropriate time.

(9) The facility must inform each resident of the name, specialty, and way of contacting the physician responsible for his or her care.

(10) The facility must prominently display in the facility written information, and provide to residents and applicants for admission oral and written information about how to apply for and use Medicare and Medicaid benefits, and how to receive refunds for previous payments covered by such benefits.

(11) Notification of changes. (i) A facility must immediately inform the resident; consult with the resident's physician; and if known, notify the resident's legal respresentative or an interested family member when there is –

(A) An accident involving the resident which results in injury and has the potential for requiring physician intervention;

(B) A significant change in the resident's physical, mental, or psychosocial status (i.e., a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);

(C) A need to alter treatment significantly (i.e., a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or

(D) A decision to transfer or discharge the resident from the facility as specified in Sec. 483.12(a).

(ii) The facility must also promptly notify the resident and, if known, the resident's legal representative or interested family member when there is –

(A) A change in room or roommate assignment as specified in Sec. 483.15(e)(2); or

(B) A change in resident rights under Federal or State law or regulations as specified in paragraph (b)(1) of this section.

(iii) The facility must record and periodically update the address and phone number of the resident's legal representative or interested family member.

(c) Protection of resident funds. (1) The resident has the right to manage his or her financial affairs, and the facility may not require residents to deposit their personal funds with the facility.

(2) Management of personal funds. Upon written authorization of a resident, the facility must hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility, as specified in paragraphs (c)(3)-(8) of this section.

(3) Deposit of funds. (i) Funds in excess of $50. The facility must deposit any residents' personal funds in excess of $50 in an interest bearing account (or accounts) that is separate from any of the facility's operating accounts, and that credits all interest earned on resident's funds to that account. (In pooled accounts, there must be a separate accounting for each resident's share.)

(ii) Funds less than $50. The facility must maintain a resident's personal funds that do not exceed $50 in a non-interest bearing account, interest-bearing account, or petty cash fund.

(4) Accounting and records. The facility must establish and maintain a system that assures a full and complete and separate accounting, according to generally accepted accounting principles, of each resident's personal funds entrusted to the facility on the resident's behalf.

(i) The system must preclude any commingling of resident funds with facility funds or with the funds of any person other than another resident.

(ii) The individual financial record must be available through quarterly statements and on request to the resident or his or her legal representative.

(5) Notice of certain balances. The facility must notify each resident that receives Medicaid benefits –

(i) When the amount in the resident's account reaches $200 less than the SSI resource limit for one person, specified in section 1611(a)(3)(B) of the Act; and

(ii) That, if the amount in the account, in addition to the value of the resident's other nonexempt resources, reaches the SSI resource limit for one person, the resident may lose eligibility for Medicaid or SSI.

(6) Conveyance upon death. Upon the death of a resident with a personal fund deposited with the facility, the facility must convey within 30 days the resident's funds, and a final accounting of those funds, to the individual or probate jurisdiction administering the resident's estate.

(7) Assurance of financial security. The facility must purchase a surety bond, or otherwise provide assurance

satisfactory to the Secretary, to assure the security of all personal funds of residents deposited with the facility.

(8) Limitation on charges to personal funds. The facility may not impose a charge against the personal funds of a resident for any item or service for which payment is made under Medicaid or Medicare (except for applicable deductible and coinsurance amounts). The facility may charge the resident for requested services that are more expensive than or in excess of covered services in accordance with Sec. 489.32 of this chapter. (This does not affect the prohibition on facility charges for items and services for which Medicaid has paid. See Sec. 447.15, which limits participation in the Medicaid program to providers who accept, as payment in full, Medicaid payment plus any deductible, coinsurance, or copayment required by the plan to be paid by the individual.)

(i) Services included in Medicare or Medicaid payment. During the course of a covered Medicare or Medicaid stay, facilities may not charge a resident for the following categories of items and services:

(A) Nursing services as required at Sec. 483.30 of this subpart.

(B) Dietary services as required at Sec. 483.35 of this subpart.

(C) An activities program as required at Sec. 483.15(f) of this subpart.

(D) Room/bed maintenance services.

(E) Routine personal hygiene items and services as required to meet the needs of residents, including, but

not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents when indicated to treat special skin problems or to fight infection, razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services, bathing, and basic personal laundry.

(F) Medically-related social services as required at Sec. 483.15(g) of this subpart.

(ii) Items and services that may be charged to residents' funds. Listed below are general categories and examples of items and services that the facility may charge to residents' funds if they are requested by a resident, if the facility informs the resident that there will be a charge, and if payment is not made by Medicare or Medicaid:

(A) Telephone.

(B) Television/radio for personal use.

(C) Personal comfort items, including smoking materials, notions and novelties, and confections.

(D) Cosmetic and grooming items and services in excess of those for which payment is made under Medicaid or Medicare.

(E) Personal clothing.

(F) Personal reading matter.

(G) Gifts purchased on behalf of a resident.

(H) Flowers and plants.

(I) Social events and entertainment offered outside the scope of the activities program, provided under Sec. 483.15(f) of this subpart.

(J) Noncovered special care services such as privately hired nurses or aides.

(K) Private room, except when therapeutically required (for example, isolation for infection control).

(L) Specially prepared or alternative food requested instead of the food generally prepared by the facility, as required by Sec. 483.35 of this subpart.

(iii) Requests for items and services. (A) The facility must not charge a resident (or his or her representative) for any item or service not requested by the resident.

(B) The facility must not require a resident (or his or her representative) to request any item or service as a condition of admission or continued stay.

(C) The facility must inform the resident (or his or her representative) requesting an item or service for which a charge will be made that there will be a charge for the item or service and what the charge will be.

(d) Free choice. The resident has the right to –

(1) Choose a personal attending physician;

(2) Be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the resident's well-being; and

(3) Unless adjudged incompetent or otherwise found to be incapacitated under the laws of the State, participate in planning care and treatment or changes in care and treatment.

(e) Privacy and confidentiality. The resident has the right to personal privacy and confidentiality of his or her personal and clinical records.

(1) Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident;

(2) Except as provided in paragraph (e)(3) of this section, the resident may approve or refuse the release of personal and clinical records to any individual outside the facility;

(3) The resident's right to refuse release of personal and clinical records does not apply when –

(i) The resident is transferred to another health care institution; or

(ii) Record release is required by law.

(f) Grievances. A resident has the right to –

(1) Voice grievances without discrimination or reprisal. Such grievances include those with respect to treatment which has been furnished as well as that which has not been furnished; and

(2) Prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents.

(g) Examination of survey results. A resident has the right to –

(1) Examine the results of the most recent survey of the facility conducted by Federal or State surveyors and any plan of correction in effect with respect to the facility. The facility must make the results available for examination in a place readily accessible to residents, and must post a notice of their availability; and

(2) Receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

(h) Work. The resident has the right to –

(1) Refuse to perform services for the facility;

(2) Perform services for the facility, if he or she chooses, when –

(i) The facility has documented the need or desire for work in the plan of care;

(ii) The plan specifies the nature of the services performed and whether the services are voluntary or paid;

(iii) Compensation for paid services is at or above prevailing rates; and

(iv) The resident agrees to the work arrangement described in the plan of care.

(i) Mail. The resident has the right to privacy in written communications, including the right to –

(1) Send and promptly receive mail that is unopened; and

(2) Have access to stationery, postage, and writing implements at the resident's own expense.

(j) Access and visitation rights. (1) The resident has the right and the facility must provide immediate access to any resident by the following:

(i) Any representative of the Secretary;

(ii) Any representative of the State:

(iii) The resident's individual physician;

(iv) The State long term care ombudsman (established under section 307(a)(12) of the Older Americans Act of 1965);

(v) The agency responsible for the protection and advocacy system for developmentally disabled individuals (established under part C of the Developmental Disabilities Assistance and Bill of Rights Act);

(vi) The agency responsible for the protection and advocacy system for mentally ill individuals (established under the Protection and Advocacy for Mentally Ill Individuals Act);

(vii) Subject to the resident's right to deny or withdraw consent at any time, immediate family or other relatives of the resident; and

(viii) Subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time, others who are visiting with the consent of the resident.

(2) The facility must provide reasonable access to any resident by any entity or individual that provides health, social, legal, or other services to the resident,

subject to the resident's right to deny or withdraw consent at any time.

(3) The facility must allow representatives of the State Ombudsman, described in paragraph (j)(1)(iv) of this section, to examine a resident's clinical records with the permission of the resident or the resident's legal representative, and consistent with State law.

(k) Telephone. The resident has the right to have reasonable access to the use of a telephone where calls can be made without being overheard.

(l) Personal property. The resident has the right to retain and use personal possessions, including some furnishings, and appropriate clothing, as space permits, unless to do so would infringe upon the rights or health and safety of other residents.

(m) Married couples. The resident has the right to share a room with his or her spouse when married residents live in the same facility and both spouses consent to the arrangement.

(n) Self-Administration of Drugs. An individual resident may self-administer drugs if the interdisciplinary team, as defined by Sec. 483.20(d)(2)(ii), has determined that this practice is safe.

(o) Refusal of certain transfers. (1) An individual has the right to refuse a transfer to another room within the institution, if the purpose of the transfer is to relocate –

(i) A resident of a SNF from the distinct part of the institution that is a SNF to a part of the institution that is not a SNF, or

(ii) A resident of a NF from the distinct part of the institution that is a NF to a distinct part of the institution that is a SNF.

(2) A resident's exercise of the right to refuse transfer under paragraph (o)(1) of this section does not affect the individual's eligibility or entitlement to Medicare or Medicaid benefits.

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42 C.F.R. Sec. 483.12 Admission, transfer and discharge rights.

(a) Transfer and discharge –

(1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.

(2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless –

(i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(ii) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(iii) The safety of individuals in the facility is endangered;

(iv) The health of individuals in the facility would otherwise be endangered;

(v) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

(vi) The facility ceases to operate.

(3) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by –

(i) The resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i) or paragraph (a)(2)(ii) of this section; and

(ii) A physician when transfer or discharge is necessary under paragraph (a)(2)(iv) of this section.

(4) Notice before transfer. Before a facility transfers or discharges a resident, the facility must –

(i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

(ii) Record the reasons in the resident's clinical record; and

(iii) Include in the notice the items described in paragraph (a)(6) of this section.

(5) Timing of the notice. (i) Except when specified in paragraph (a)(5)(ii) of this section, the notice of transfer or discharge required under paragraph (a)(4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice may be made as soon as practicable before transfer or discharge when –

(A) the safety of individuals in the facility would be endangered under paragraph (a)(2)(iii) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (a)(2)(iv) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a)(2)(ii) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (a)(2)(i) of this section; or

(E) A resident has not resided in the facility for 30 days.

(6) Contents of the notice. The written notice specified in paragraph (a)(4) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement that the resident has the right to appeal the action to the State;

(v) The name, address and telephone number of the State long term care ombudsman;

(vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and

(vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(7) Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

(b) Notice of bed-hold policy and readmission – (1) Notice before transfer. Before a nursing facility transfers a resident to a hospital or allows a resident to go on therapeutic leave, the nursing facility must provide written information to the resident and a family member or legal representative that specifies –

(i) The duration of the bed-hold policy under the State plan, if any, during which the resident is permitted to return and resume residence in the nursing facility; and

(ii) The nursing facility's policies regarding bed-hold periods, which must be consistent with paragraph (b)(3) of this section, permitting a resident to return.

(2) Bed-hold notice upon transfer. At the time of transfer of a resident for hospitalization or therapeutic leave, a nursing facility must provide to the resident and a family member or legal representative written notice which specifies the duration of the bed-hold policy described in paragraph (b)(1) of this section.

(3) Permitting resident to return to facility. A nursing facility must establish and follow a written policy under which a resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, is readmitted to the facility immediately upon the first availability of a bed in a semi-private room if the resident –

(i) Requires the services provided by the facility; and

(ii) Is eligible for Medicaid nursing facility services.

(c) Equal access to quality care.

(1) A facility must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services under the State plan for all individuals regardless of source of payment;

(2) The facility may charge any amount for services furnished to non-Medicaid residents consistent with the notice requirement in Sec. 483.10(b)(5)(i) and (b)(6) describing the charges; and

(3) The State is not required to offer additional services on behalf of a resident other than services provided in the State plan.

(d) Admissions policy.

(1) The facility must –

(i) Not require residents or potential residents to waive their rights to Medicare or Medicaid; and

(ii) Not require oral or written assurance that residents or potential residents are not eligible for, or will not apply for, Medicare or Medicaid benefits.

(2) The facility must not require a third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility. However, the facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, without incurring personal financial liability, to provide facility payment from the resident's income or resources.

(3) In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility. However, –

(i) A nursing facility may charge a resident who is eligible for Medicaid for items and services the resident has requested and received, and that are not specified in the State plan as included in the term "nursing facility services" so long as the facility gives proper notice of the

availability and cost of these services to residents and does not condition the resident's admission or continued stay on the request for and receipt of such additional services; and

(ii) A nursing facility may solicit, accept, or receive a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to a Medicaid eligible resident or potential resident, but only to the extent that the contribution is not a condition of admission, expedited admission, or continued stay in the facility for a Medicaid eligible resident.

(4) States or political subdivisions may apply stricter admissions standards under State or local laws than are specified in this section, to prohibit discrimination against individuals entitled to Medicaid.